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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TERRY STEWART, Director, Arizona Department of Corrections, et al., *Petitioners,*

v.

RAMON MARTINEZ-VILLAREAL, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The American Bar Association ("ABA") submits this brief as amicus curiae[1] pursuant to Rule 37.3 of the Rules of the Supreme Court, to provide the Court its perspective regarding this case. The ABA[2] is a voluntary, national membership organization of the legal profession. Its more than 392,000 members, from each state and territory, and the District of Columbia, include prosecutors, public defenders, private lawyers, trial and appellate judges from the state and federal courts, legislators, law professors, law enforcement and

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[1] Rule 37.3 Statement: All parties have given written consent to the filing of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

corrections personnel, law students and a number of "non-lawyer" associates in allied fields.

The ABA is dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const. art. 1, § 1.2. During the past two decades, that dedication has led the ABA to make habeas corpus one of its priorities. In 1982, the Association adopted a comprehensive policy urging specific reforms in federal and state postconviction procedures. In 1983 and 1991, the ABA provided testimony and written materials to both Houses of Congress considering reform of the habeas corpus statutes.

The ABA has been concerned particularly with the administration of justice in habeas corpus proceedings brought by prisoners sentenced to death in state courts. In 1989, under a grant from the State Justice Institute, an ABA task force conducted an intensive study of death penalty habeas corpus reform. Based upon the task force's report and recommendations, the ABA in 1990 adopted, by overwhelming vote, a comprehensive policy statement which urged legislative reform of habeas corpus procedures, both state and federal, to make them more efficient and better able to address the merits of the fundamental claims many postconviction petitions raise in capital cases. The ABA is keenly aware of the need for reform of habeas corpus procedures, and has worked hard during the past two decades to achieve that reform. The ABA, however, has never advocated reform at the expense of justice.

SUMMARY OF ARGUMENT

Reform at the expense of justice is precisely what Petitioners and their amici would have this Court believe was the central purpose behind Congress passing the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132,

1996 U.S.C.C.A.N. (110 Stat.) 1214 ("AEDPA"). Petitioners and their amici argue that Congress intended that the AEDPA forever bar a state prisoner from bringing a properly preserved and presented Eighth Amendment competency claim before a federal habeas court. Petitioners come to this irrational result by ignoring, and asking this Court to ignore, cardinal rules of statutory construction that this Court has long applied. Furthermore, Petitioners' argument requires this Court to conclude that Congress, breaking with two hundred years of history, has for the first time decided to revoke a prisoner's right to have a federal court hear a federal constitutional claim, and has done so in a most ambiguous manner.

Since the birth of our nation, Congress and this Court always have guaranteed prisoners at least one opportunity to raise, in a federal court, all federal constitutional challenges to their incarceration. That opportunity, whether technically styled as writ of error, removal, or habeas review, always has been a matter of right and not simply a matter of discretionary review. Neither the text nor the legislative history of the AEDPA provide the clear evidence necessary for this Court to determine that Congress has now decided to break with this heritage.

The interpretation of the statute advocated by Petitioners is also inconsistent with the text and central purpose of the AEDPA. Section 2244 was designed and drafted to require that prisoners bring all of their claims in a single habeas petition, lest prisoners "abuse" the right to habeas corpus by holding back claims for successive petitions, or by simply filing redundant petitions. Here, Respondent did precisely what he was supposed to do: he bundled all his claims into a single petition. Having persuaded the lower courts that Respondent's competency claim was premature, it is Petitioners who seek to abuse habeas law by reading it, against two hundred years of

tradition, to bar federal review of a properly preserved and presented constitutional claim.

Simply put, reading the AEDPA to bar a federal court from determining a properly preserved and presented constitutional competency claim leads to an "absurd" result. As this Court has consistently held, a statute should never be so interpreted.

ARGUMENT

I. THIS COURT SHOULD CONCLUDE THAT SECTION 2244 CANNOT RATIONALLY BE INTERPRETED TO BAR PROPERLY PRESERVED CLAIMS THAT WERE RAISED BUT NOT DETERMINED IN A PRIOR HABEAS APPLICATION.

A. Reading Section 2244 To Bar Claims That Were Raised In A Prior Habeas Application But Deferred As Premature Would Be Irrational And Would Thwart The Purpose Of The AEDPA.

Section 2244(b)(1), which requires that claims "presented in a prior application" be dismissed, cannot be construed to bar claims that a federal habeas court expressly declined to hear on prematurity grounds in the proceedings upon the prior application. Rather, that section must refer to claims that actually were "presented" -- that is, raised *and determined* -- in a prior application.[3] Otherwise, the central purpose of Section 2244, which Petitioners concede is to give applicants "one bite at the apple" of federal habeas relief (Petitioners' Br.

[3] A claim that was not properly preserved in the state courts, however, is procedurally defaulted and may not be "presented," in the language of the AEDPA, even in an applicant's original habeas corpus application. *See, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991).

at 12), is thwarted. Section 2244 simply cannot rationally be interpreted to apply to claims that a habeas applicant properly presented in state court, and timely raised in his earlier habeas application, but that the habeas court, at the behest of Petitioners, refused to determine.

The fact that Section 2244 concerns claims that actually were heard and determined in a prior habeas application is demonstrated by the Section's title: "Finality of determination." The thrust of Section 2244(b)(1) is to assure that a federal "determination" of habeas claims is final. A properly preserved claim is determined when it has been adjudicated on the merits.[4] There has never been any such "determination" here; rather, the lower courts concluded that one of Respondent's properly preserved and presented claims should be deferred to a later time.

Section 2244(b)(2) compels applicants to bundle their habeas claims together for a single federal "determination." That is precisely what Respondent did. Specifically, Respondent included his competency claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), with his other habeas claims and submitted them all to the federal district court in his earlier habeas application. Petitioners, however, argued that the *Ford* competency claim was "premature" and urged the district court *not* to determine it: "To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives." *Martinez-Villareal v. Stewart*, 118 F.3d 628, 630 n.1 (9th Cir. 1997) (quoting Petitioners' Reply to Response to Motion for Summary Judgment). The district court accepted Petitioners'

[4] The "determination" to which Section 2244 accords "finality" as to a claim that was not properly preserved in state court is the determination that the claim is procedurally defaulted. *See* n.3 at p.4 above.

argument, holding that the competency claim was "premature." The court of appeals affirmed, and expressly "declined to address [Respondent's] competency claim because it was premature." *Id.* at 630. The court of appeals left no doubt that it was reserving determination of the competency question for a later proceeding:

> To eliminate any ambiguity, we reiterate that the claim of [Respondent's] current incompetence was denied as premature by the district court. . . . Our instruction to enter judgment denying the petition is not intended to affect any later litigation of that question.

Martinez-Villareal v. Lewis, 80 F.3d 1301, 1309 n.1 (9th Cir. 1996).

Having successfully persuaded the district court and the court of appeals not to determine Respondent's competency claim until his execution was scheduled because that claim supposedly was "premature," Petitioners now urge that Section 2244 be interpreted to bar the competency claim forever, though a federal habeas court has never determined that properly preserved claim. Petitioners thus urge an interpretation of Section 2244 that would force Respondent to pay with his life for having sought to raise his *Ford* claim at all possible times because, in doing so, he acted both too early *and* too late. That interpretation of Section 2244 is simply "unfathomable." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510 (1989) (holding that regardless of text of Federal Rule of Evidence, language could not be read to engender an irrational result). It "produces an absurd, and perhaps unconstitutional, result" that

"cannot rationally" be accepted. *Id.* at 527-28 (Scalia, J., concurring in judgment).[5]

This Court has long recognized that it should avoid reading a statute in a manner that produces an absurd result. *See Rowland v. California Men's Colony*, 506 U.S. 194, 200 n.3 (1993). Were this the only possible "plain language" interpretation of Section 2244, this Court would be called upon to interpret and qualify that Section's language in a way that "does least violence to the text." *Green*, 490 U.S. at 529 (Scalia, J., concurring in judgment). Here, however, this Court does not have to engage in reading the language in a manner that "does least violence to the text" because there is a reasonable interpretation of Section 2244(b)(1) that avoids any absurdity and does *no* violence to the text (see Section I.B below) -- that is, to read that section to bar only those properly preserved claims that were raised *and determined* in a prior federal habeas application.

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[5] The absurdity of this position is highlighted by the fact that its closest parallel is found not in the annals of our own government, but in that of fictional Fredonia, where newly appointed leader Rufus T. Firefly opened his first Cabinet meeting with the following exchange:

> Firefly: Hello members of the cabinet. We'll take up old business.
> Deputy: (Raises hand and stands) I wish to discuss the tariff.
> Firefly: Sit down. That's new business.
> Deputy: (Sits).
> Firefly: (Looks around the table. No one raises a hand.) No old business? Very well. Then we take up new business.
> Deputy: (Stands) Now about that tariff . . .
> Firefly: Too late! That's old business already. Sit down.

"Duck Soup" (© Paramount Pictures, Inc. 1933).

A contrary reading would mean that, whenever a federal court dismisses a habeas application raising premature or unexhausted claims, those claims would be barred forever. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982) ("[A] district court must dismiss habeas petitions containing both unexhausted and exhausted claims."). Yet Congress implicitly has directed the contrary result in Section 2254(b)(2). After codifying the exhaustion rule in Section 2254(b)(1), Congress states that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). By using the word "may," Congress authorized dismissal for failure to exhaust -- as opposed to "denial on the merits" -- with the clear expectation that the dismissed applicant later will file a subsequent application containing the newly exhausted claims that did not warrant being "denied on the merits" in their unexhausted state. This subsequent application, though numerically a second application, could not be a "second or successive" application barred by Section 2244(b)(1). If Section 2244(b)(1) were read, as Petitioners urge, to bar all subsequent claims, then Section 2254(b)(2) would be surplusage since there could be no such subsequent application. This reading would conflict with the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

B. Congress's Use Of The Term "Second Or Successive," Which This Court And The Habeas Corpus Rules Have Defined, Reflects The Intention That Previously Undetermined Claims Not Be Barred.

The term "second or successive" did not come to the AEDPA devoid of history or prior meaning in the habeas

context. Both Habeas Corpus Rule 9(b) and previous case law defined "second or successive." This Court has noted that the term "successive petition" has developed a "distinct meaning." *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6 (1986) (plurality opinion). Specifically, a "successive petition" is one that "raises grounds identical to those raised *and rejected on the merits* on a prior petition." *Id.* (emphasis added); *see also McCleskey v. Zant*, 499 U.S. 467, 487 (1991) (quoting Habeas Corpus Rule 9(b)). In passing the AEDPA, Congress was no doubt aware of the meaning of "successive" in the context of habeas proceedings. "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (relying on prior judicial interpretation of statutory language in Title VI to inform interpretation of Title IX).

When Congress passed the AEDPA, it took into account possible conflicts with codified Rules, and it amended Rules inconsistent with the new law to make them consistent with the AEDPA. For example, before the enactment of the AEDPA, Federal Rule of Appellate Procedure 22 read:

> In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or circuit judge issues a certificate of probable cause.

On the same day Congress enacted the AEDPA, it amended Rule 22 so that it would read consistently with the certification requirements in the AEDPA. Rule 22 now requires judges to issue certificates of appealability pursuant to amended 28 U.S.C. § 2253. Fed. R. App. P. 22 (amended 1996).

Congress did not, however, amend Habeas Corpus Rule 9(b), which before and after the enactment of the AEDPA read:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief *and the prior determination was on the merits* or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Habeas Corpus Rule 9(b) (emphasis added). Congress thus left Rule 9(b) intact, finding it consistent with the AEDPA. The only reasonable conclusion is that Congress intended the courts to continue treating some subsequent petitions as if, legally, they were first petitions because their properly preserved claims, although presented in an earlier petition, were not then "determin[ed] . . . on the merits . . . ." Habeas Corpus Rule 9(b). If Congress thought that Habeas Corpus Rule 9(b) was inconsistent with the AEDPA, it would have amended that Rule, as it did with Federal Rule of Appellate Procedure 22.

In the absence of a specific definition in Section 2244, this Court should look to the fact that Congress left intact the Rule 9(b) language defining a successive petition as one that was previously *determined on the merits*. Nothing in the text or legislative history of the AEDPA indicates that Congress intended to alter this distinct meaning of the term. This Court has said that "[w]here Congress has not expressly declared a word to have a particular meaning, it will be presumed to have used the word in its well-understood public and *judicial meaning*." *Toxaway Hotel Co. v. Smathers & Co.*, 216 U.S. 439, 439 (1910) (emphasis added); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 700-01 (1992) (applying same rule where Congress re-enacts a statute after this Court has interpreted the language of the former provision).

Based upon this well-established meaning of "second or successive" petition, the courts of appeals uniformly have held that Section 2244 does not apply to habeas applications asserting claims that were raised in a prior application but were dismissed as unexhausted or for failure to comply with filing requirements. *See Dickenson v. Maine*, 101 F.3d 791, 791 (1st Cir. 1996) (exhaustion); *Camarano v. Irvin*, 98 F.3d 44, 46-47 (2d Cir. 1996) (exhaustion); *Christy v. Horn*, 115 F.3d 201, 208 (3d Cir. 1997) (exhaustion); *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997) (exhaustion); *Benton v. Washington*, 106 F.3d 162, 165 (7th Cir. 1996) (filing requirements); *In re Turner*, 101 F.3d 1323, 1323 (9th Cir. 1997) (exhaustion). The same result must apply to claims that were dismissed as premature. Section 2244 -- the Section entitled "Finality of determination" -- simply cannot reasonably be interpreted to apply to properly preserved claims that were never *determined*.

Petitioners' arguments rest on the notion that Congress impliedly redefined "successive" so that it no longer retains its prior meaning. Before the enactment of the AEDPA, Section 2244(b) read:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law . . . a subsequent application for a writ of habeas corpus . . . need not be entertained by a court of the United States . . . .

28 U.S.C. § 2244(b) (1966). Petitioners point out that the AEDPA no longer includes the phrase "on the merits," and incorrectly conclude that the world of "successive petitions" is now divisible into just two categories: (1) claims that were previously presented, regardless of whether or how they were determined in the prior petition; and (2) claims that were not

presented, but fall into one of the specified exceptions. (Petitioners' Br. at 10-11).

Petitioners' literal reading is incorrect. Courts have recognized that:

> It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945). This Court in proposing and later in interpreting Rule 9(b), and Congress in confirming and adopting that provision and then in repeating its language in amended Section 2244(b), have clearly revealed the "purpose or object" of Section 2244(b): to give habeas corpus applicants one, and only one, shot at a federal judicial determination of their properly preserved constitutional claims. Removing the words "on the merits" does not suggest an intent to redefine the phrase "second or successive" but rather to preserve the term-of-art meaning. Thus, if a claim raised in a prior habeas petition is rejected on procedural default grounds, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991), the claim has not been denied "on the merits" but it *has* been "determined" previously.[6] Accordingly, any attempt to present the claim in a later habeas application would be "successive" as the term of art is used in Rule 9(b) and the amended Section 2244(b) -- although not necessarily under a "plain meaning" interpretation of the "on the merits" language that Congress deleted from the prior Section 2244(b).

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[6] *See* n.4 at p.5 above.

C. This Court Should Interpret Section 2244 So As To Avoid A Needless Constitutional Inquiry.

This Court long has recognized that:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that the Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Crowell v. Benson, 285 U.S. 22, 62 (1932). Chief Justice Marshall first stated that prudential rule of statutory construction in his "opinion for the Court in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), and [it] has for so long been applied by this Court that it is beyond debate." *Debartolo Corp. v. Florida Gulf Coast*, 485 U.S. 568, 575 (1988). It remains effective today. *E.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994).

If the court of appeals below had read Section 2244 to bar Respondent's competency claim, it would have opened a Pandora's box of constitutional issues -- to some, but not all, of which Petitioners and their amici devote numerous pages of complex and arduous analysis. The court of appeals recognized that there were "strong indications that under these narrow circumstances [when a claim will always be premature on a first petition], the new statute poses a serious constitutional problem." *Martinez-Villareal v. Stewart*, 118 F.3d 628, 632 (9th Cir. 1997). Specifically, the court of appeals would have had to address if barring a prisoner's ability to have his competency claim heard in federal court constituted a suspension of the writ of habeas corpus in violation of the United States Constitution. The court of appeals prudently, and properly, avoided such a complex inquiry.

Similarly, this Court previously has construed the habeas statute to avoid addressing the relatively uncharted territory of the Suspension Clause of the United States Constitution. *See* U.S. Const. art. I, § 9, cl. 2. Confronting the propriety of changes to Section 2244 concerning successive petitions in *Sanders v. United States*, 373 U.S. 1, 11-12 (1963), the Court warned that "if construed to derogate from the traditional liberality of the writ of habeas corpus, . . . § 2244 might raise serious constitutional questions." By reading the new Section 2244(b) to permit habeas courts to consider the "ends of justice," however, the Court averted a constitutional question. Similarly, in *United States v. Hayman*, 342 U.S. 205, 223 (1952), the Respondent argued that the new Section 2255 might violate the Suspension Clause.[7] The Court avoided the question by noting that Section 2255 preserved the traditional writ as a backstop.

Unless a constitutional construction of Section 2244(b) is "plainly contrary to the intent of Congress," this Court again should construe that statute to avoid constitutional problems.[8]

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[7] The influential argument that the Suspension Clause mandates access to habeas corpus in the federal courts is found in the Brief of Paul A. Freund, Counsel for Respondent in *Hayman* at 29: "[H]aving established Federal courts Congress would be powerless to deny the privilege of the writ. Otherwise, Article 1, section 9 would be reduced to a dead letter."

[8] In signing the AEDPA into law, President Clinton, concerned about the constitutionality of another provision in the AEDPA, specifically relied on the federal courts continuing their practice of construing a statute to avoid a needless constitutional problem:

> I expect that the [federal] courts, following their usual practice of construing ambiguous statutes to avoid constitutional problems, will read section 104 [of the AEDPA] to permit independent Federal court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal laws.

President's Signing Statement, 32 Weekly Comp. Pres. Doc. 719 (Apr. 29, 1996), *reprinted in* 1996 U.S.C.C.A.N. 961-3.

Debartolo Corp., 485 U.S. at 575, citing *NLRB v. Catholic Bishop*, 440 U.S. 490, 499-501, 504 (1979). Such a construction would not be "plainly contrary to the intent of Congress" in this case. *Id.* The purpose of the AEDPA is "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-518 at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 944. As this Court has stressed, "[t]he new restrictions on successive habeas petitions constitute a modified res judicata rule, a restraint on what is called in habeas practice 'abuse of the writ.'" *Felker v. Turpin*, 116 S. Ct. 2333, 2340 (1996). "Abuse of the writ" occurs when a petitioner deliberately or inexcusably withholds available grounds in a first application for collateral review and then attempts to raise them later. *Sanders*, 373 U.S. at 18.

Respondent in this instance has not abused the writ of habeas corpus: he has not caused unnecessary delay and is not seeking repetitious review of a claim that a habeas court already has determined. Respondent filed his competency claim with his other claims in his earlier federal habeas petition as Section 2244 mandated. Petitioners persuaded the lower court that the competency claim was not yet ripe for determination. That being the case, the court of appeals correctly determined that the AEDPA does not bar this claim now that it is fully ripe.

II. THIS COURT SHOULD NOT READ THE AEDPA TO PRECLUDE HABEAS REVIEW OF A *FORD* CLAIM BECAUSE CONGRESS ALWAYS HAS GRANTED FEDERAL REVIEW AS OF RIGHT FOR DETERMINATION OF FEDERAL RIGHTS AND CONGRESS DID NOT CLEARLY REVOKE THAT RIGHT IN THE AEDPA.

Since 1789, Congress's mandate concerning federal protection of federal rights has been unequivocal. For every federal constitutional right available to persons incarcerated pursuant to federal or state authority, Congress has insisted upon a full, meaningful remedy in federal court for violations of that right. Whether technically styled as writ of error, removal, or habeas review, Congress has always provided the right of access to a federal forum for any prisoner with a federal constitutional claim. *See Whitten v. Tomlinson*, 160 U.S. 231, 238-39 (1895) (discussing the interchangeability of these three methods of review).

Congressional action "inform[s]" this Court's interpretation of habeas review. *See Felker v. Turpin*, 116 S. Ct. 2333, 2339 (1996) (noting that congressional legislation "inform[s]" Court's consideration of original habeas petitions). Two hundred years of congressional action indicate that Congress has always provided for federal review as of right for federal constitutional claims. At times when Congress was particularly concerned with the effectiveness of state review of these claims, Congress even provided state prisoners *multiple* avenues of federal review as of right. Nothing in the AEDPA or its legislative history indicates that Congress, for the first time in this nation's history, has now decided to deny a prisoner the right to have a federal court hear his federal claim. Given the historical role of federal review, this Court should not now interpret the AEDPA to revoke impliedly

Respondent's right to bring his properly preserved and presented Eighth Amendment claim in federal court.

Federal review as of right for federal constitutional claims has existed continuously since the founding of this nation. One of the earliest acts of the First Congress created the federal judiciary and delineated some of the rights of persons in custody pursuant to federal or state authority. *See* Judiciary Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82. In the 1789 Act, Congress established two avenues for federal review of federal claims. First, Section 14 of the Act created a federal habeas corpus remedy for violations of constitutional rights and made that remedy available to all prisoners "in custody, under or by colour of the authority of the United States." *Id.*; *see also Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (discussing congressional "obligation" to create habeas jurisdiction in the federal courts). Although the habeas corpus powers of federal courts as codified in the 1789 Act extended only to federal prisoners, so too did the Bill of Rights and other federal protections. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Peters) 243 (1833). State prisoners simply had few federal rights needing federal protection.

The second avenue, however, did provide state prisoners with federal judicial protection. In Section 25 of the 1789 Act, Congress extended writs of error *as of right* to state prisoners who were denied relief "in the highest court of law . . . of a State in which a decision in the suit could be had" on claims challenging a state statute or other state authority "on the ground of [its] being repugnant to the constitution, treaties or laws of the United States" or questioning "the construction of . . . the constitution, . . . a treaty, [or] statute . . . of the United States." *See* Judiciary Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85-86. Writ of error jurisdiction afforded this Court an opportunity to review *de novo* legal claims of state prisoners

based on federal rights. *See Cohens v. Virginia*, 19 U.S. 264, 414-15 (1821). Unlike modern certiorari, writ of error was a matter *of right*, not of this Court's exercise of discretion. *See* Judiciary Act of Sept. 24, 1789, ch. 20 , § 25, 1 Stat. 73, 85-86; 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.4(d), at 39-40 (2d ed. 1994).

In the first half of the 19th century, Congress began affording substantive rights to certain classes of persons incarcerated by the states. In each instance, Congress accompanied its grant of rights with a coextensive federal remedy for violations of those rights. Furthermore, Congress was specifically concerned that the method of federal review provided would be effective in safeguarding the newly granted rights. For example, Congress determined that certain states, intent on interfering with federal officers acting pursuant to federal authority, could effectively evade writ of error review by employing protracted pretrial confinement. *See* 1 *Federal Habeas Corpus Practice and Procedure* § 2.4(d), at 40. Thus, in 1833 Congress empowered federal courts to entertain habeas petitions from state prisoners, or to exercise removal jurisdiction over state prisoners, who claimed to have acted under federal law. *See* Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634. At the time, there was no doubt that federal authorization could have been raised as a defense to any prosecution in state court. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Nevertheless, Congress obligated federal courts in habeas proceedings to re-examine those federal defenses.

State interference with national interests again prompted Congress to act when, in 1842, it extended federal rights to another class of persons in state custody, this time foreign nationals held on account of an act claimed to have been done under color of foreign authority. *See* Act of Aug. 29, 1842, ch.

257, 5 Stat. 539. Congress again legislated enforcement of those federal rights by authorizing federal courts to grant writs of habeas corpus to state prisoners protected by the Act. *See In re Neagle*, 135 U.S. 1, 71-72, 74 (1890).

The Civil War revolutionized the relationship between the states and the federal government. One manifestation of that change was an expansion of federal civil rights and their application in state proceedings. And as federal rights grew, so too did the habeas corpus remedy and other forms of federal review designed to protect those rights in federal courts if state courts did not protect them. Congress, fearing that "recalcitrant local authorities" would fail to enforce newly created federal rights, addressed the situation by expanding all three avenues of federal review as of right. *See* Larry W. Yackle, *Post-Conviction Remedies* § 19, at 86 (1981). The first expansion came when, in 1863, Congress expanded removal jurisdiction and authorized removal to federal court, either pre-judgment or post-judgment, of any claim arising under the Constitution, laws or treaties of the United States. Habeas Corpus Act, ch. 81, § 5, 12 Stat. 755, 756-57 (1863). But Congress did not relegate state prisoners to only this avenue of access to federal appellate review.

When the Fourteenth Amendment, together with a number of civil rights statutes, extended federal protections to all state prisoners, the same Congress that passed this amendment immediately gave the federal courts the "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385. The legislative history of this 1867 Act is sparse but unambiguous. Congress proclaimed its intention to make habeas corpus "a bill of the largest liberty," available to "enforce the liberty of all persons." Cong.

Globe, 39th Cong., 1st Sess. 4151 (1866) (Rep. W. Lawrence). As Senator Trumball succinctly described the relationship between the new Fourteenth Amendment rights and Congress's simultaneous extension of the habeas corpus remedy:

> Now a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have . . . the benefit of the writ . . . [and] recourse to United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.

Cong. Globe, 39th Cong., 1st Sess. 4229 (1866).

This Court clearly and promptly recognized the scope of federal court power to review state court adjudication of the newly enacted federal rights. One year after passage of the 1867 Act, Justice Chase, speaking for a unanimous Court, explained:

> This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.

Ex parte McCardle, 73 U.S. (6 Wall.) 318, 321-22 (1868). Eighteen years later, in *Ex parte Royall*, 117 U.S. 241, 247 (1886), the Court again stated that "[t]he grant . . . of jurisdiction to issue writs of habeas corpus, is in language as broad as could well be employed." *See also id.* at 253 (citing *Ex parte Bridges*, 2 Woods 428 (5th Cir. 1875)).

The same Reconstruction Congress that expanded the habeas corpus remedy also simultaneously expanded writ of

error jurisdiction, affirmatively guaranteeing a federal forum as of right for a state prisoner to air his federal claims. Judiciary Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385. Under the amended standard, the Supreme Court's writ of error jurisdiction was no longer restricted to cases where a federal question error appeared on the "face of the record." *Id.* Through the combination of that expanded writ of error provision, the broadened habeas remedy, and the 1863 removal statute, Congress demonstrated its distrust of the effectiveness of state remedies to guarantee federal rights by "widen[ing] the range of claims cognizable in all three types of proceedings up to Article III's federal-question maximum":

> Through all three modes of review, *Congress sought to assure prisoners of one full opportunity to enforce their newly given national rights in a national court*, whether via expanded writ of error review on appeal in the Supreme Court, or -- lest the state courts' expected systematic resistance negate rights before writ of error remedies matured -- via the extension to *all* prisoners of full-fledged, pre-writ-of-error habeas corpus and removal protections.

1 *Federal Habeas Corpus Practice and Procedure* § 2.4(d), at 41, 42-43 (emphasis added).

Following the Reconstruction era, Congress focused on guaranteeing the availability of *at least* one effective avenue of federal review *as of right* for the determination of federal rights. After this Court narrowly construed the post-war federal question removal statutes, the focus shifted to the use of the writ of error as the primary vehicle for federal review. *See Virginia v. Rives*, 100 U.S. 313, 319, 322 (1879). Because the writ of error, unlike modern certiorari, provided review as of right, the federal habeas remedy was de-emphasized during that

period. Beginning in 1885, both Congress and the Court began to scale back on habeas corpus. Congress restored the Supreme Court's appellate habeas jurisdiction in an effort to create uniformity in habeas review by the lower courts. Act of Mar. 3, 1885, ch. 353, 23 Stat. 437; *see also* 1 *Federal Habeas Corpus Practice and Procedure* § 2.4(d), at 46. This Court understood the 1885 Act to identify the Court's own "writ of error from the highest court of the State" as the preferred mode of federal appellate review as of right. *Ex parte Royall*, 117 U.S. 241, 253 (1886). Hence, this Court substituted *de novo* review as of right in the Supreme Court for the exact form of review that lower federal courts would have provided on habeas review. *See Whitten*, 160 U.S. at 238-39 (comparing writ of error, removal, and habeas review).

This Court continued to exercise habeas review, however, whenever writ of error review could not afford an effective remedy. *See, e.g., Pettibone v. Nichols*, 203 U.S. 192, 202 (1906) (interlocutory extradition proceedings); *Felts v. Murphy*, 201 U.S. 123, 128-30 (1906) (petitioner could not afford to pay for transcript necessary to permit exhaustion of state remedies and then writ-of-error remedies); *Storti v. Massachusetts*, 183 U.S. 138, 142-43 (1901) (immediate review necessary because of impending execution).

By the beginning of this century, the practical difficulties inherent in placing before this Court all federal review for the growing nation led to the erosion of the writ of error. In 1914, Congress acknowledged the growing ineffectiveness of writ of error review by enacting the first in a series of laws that would replace this Court's *mandatory* writ of error review with *discretionary* certiorari review. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. These developments culminated in the near complete replacement of the writ of error by discretionary certiorari review in 1925. *See* Act of Feb. 13, 1925, ch. 229,

§ 237, 43 Stat. 936, 937. At the same time the writ of error was being replaced, however, this Court re-established the federal habeas remedy as the primary method of federal judicial redress as of right of constitutional violations culminating in incarceration. These changes began in *Frank v. Mangum*, 237 U.S. 309, 329-32 (1915), and *Moore v. Dempsey*, 261 U.S. 86, 90-92 (1923), which recognized the expanded scope now due habeas review in light of the decline of writ of error review. This Court confirmed the changes in *Brown v. Allen*, 344 U.S. 443 (1953), and Congress codified them in full in 1966. *See* Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1104 (current version at 28 U.S.C. §§ 2244, 2254); *see, e.g., Herrera v. Collins*, 506 U.S. 390, 403 (1993) (habeas is available to redress "any constitutional violation which had occurred at the first trial"); *McCleskey v. Zant*, 499 U.S. 467, 479 (1991) (habeas is available to resolve "all dispositive constitutional claims presented in a proper procedural manner"); *Teague v. Lane*, 489 U.S. 288, 306 (1989) (plurality opinion) (discussing the "broad scope of constitutional issues cognizable on habeas"); *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) (stating that "a state prisoner's challenge to the trial court's resolution of dispositive federal issues is always fair game [for] federal habeas [review]"). Taken together, therefore, review on writ of error, removal, and/or habeas corpus -- from 1789 to the present -- has consistently assured *state* as well as federal prisoners of at least *one* opportunity for federal judicial review *as of right* of *all* properly preserved constitutional challenges to their incarceration.

In the present case, Petitioners and their amici have argued that this Court must answer the question whether habeas corpus has expanded substantially over the course of American history. The question, by its very nature, is both erroneous and irrelevant to the case at bar. The appropriate inquiry is whether the reach and scope of federal court review as of right of the

legality of custody under constitutional law has expanded. The answer is that it has *not*. From the adoption of the Judiciary Act of 1789 until today, Congress has authorized, and federal courts have provided, federal review *as of right* of fundamental federal questions raised by the government's -- or a state's -- decision to incarcerate an individual. By doing so, Congress has firmly established the principle that a prisoner will be afforded access to federal review as of right to air his constitutional claims.

When Congress has followed such an "established principle," this Court has held that it will find that principle abandoned only on "a clear showing that this result was intended." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (Rehnquist, J.); *see also Ex parte Bakelite Corp.*, 279 U.S. 438, 454 (1929) (noting "the propriety in mentioning the fact that Congress always has treated [an institution] as having [a certain] status"). If Congress had intended a "radical departure" from the tradition of providing a federal forum to a state prisoner, Congress "no doubt would have used explicit language to this effect." *Ruckelshaus*, 463 U.S. at 685 n.7.

The text and legislative history of the AEDPA give no indication that Congress ever contemplated that the statute would effectuate this "radical departure." It is inconceivable that, with the passage of the AEDPA, Congress has broken now with two hundred years of history by denying state prisoners access to federal review as of right of a properly preserved and presented federal constitutional claim, and has done so without so much as a whisper.[9] A proper reading of the AEDPA, in

[9] The President, in signing the AEDPA, noted that some had expressed concern that it "could be interpreted in a manner that would undercut meaningful Federal habeas corpus review." President's Signing Statement, 32 Weekly Comp. Pres. Doc. 719 (Apr. 29, 1996), *reprinted in* 1996 U.S.C.C.A.N. 961-2. The President chose to sign the bill into law, however, "confident" that the federal courts would continue to "interpret th[e] provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary." *Id.*

light of the history of federal review, demonstrates that Congress never considered a *Ford* claim to be a "second and successive" petition when it is properly raised in a first habeas petition but procedurally deferred to a later time.

CONCLUSION

The ABA has, for many years, championed the need for reform in the area of habeas corpus review. With the passage of the AEDPA, Congress has acted to address concerns relating to abusive habeas practices, a purpose consistent with two hundred years of history surrounding the writ of habeas corpus. Nothing in the text or legislative history of the AEDPA indicates that Congress intended to deny a prisoner the right to a determination by a federal habeas court of an Eighth Amendment claim properly preserved in state court and raised in a timely and procedurally proper manner on habeas corpus. This reading of the statute, proffered by Petitioners and their amici, runs counter to the unbroken tradition of providing a prisoner with federal review as of right to all federal constitutional claims.

Reading the AEDPA to preclude federal review of Respondent's properly preserved and presented Eighth Amendment claim also would ignore the central purpose of the AEDPA. In keeping with this Court's definition of a "second or successive" application as one which had been, or could have been but was not, raised and "determined" in a federal court, Congress amended Section 2244 to bar a prisoner from bringing repetitive applications that raise grounds that were or

could have been previously addressed and resolved on habeas review. Respondent in this case has never been given the opportunity to raise his competency claim on habeas review, first because Petitioners argued his claim was "premature," and now because Petitioners argue that his claim is "second or successive." This is precisely the kind of "absurd" result that this Court consistently has avoided by reading statutes in a rational manner -- and that Congress has avoided since 1789 by providing for at least one opportunity for federal review as of right of all constitutional challenges to incarceration.

For these reasons, the American Bar Association, as amicus curiae, respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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